Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1947

DAVID ABRAMOVICH,

Petitioner,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, SUFFOLK COUNTY, NEW YORK, a/k/a THREE VILLAGE CENTRAL SCHOOL DISTRICT NO. 1,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

_____

No. _____

- -X

DAVID ABRAMOVICH,

Petitioner,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, SUFFOLK COUNTY, NEW YORK, a/k/a Three Village Central School District No. 1,

Respondent.

- -X

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

The petitioner, David Abramovich, prays that a Writ of Certiorari be issued to review the opinion and order of the Court of Appeals of the State of New York rendered in these proceedings on February 13, 1979.

OPINIONS BELOW.

Motion No. 289--decision on motion for reargument in the Court of Appeals, State of New York. The opinion of the Court of Appeals of the State of New York as follows:

46 N.Y. 2d 450, 414 NYS 2d 109 (1979) appears in Appendix A, *infra* page 26. The opinion of the Appellate Division of the Supreme Court, New York State, Second Department, reported and cited as follows: 62 A.D. 2d 252, 403 NYS 2d 919 (1978) appears in Appendix B, *infra* page 48. The opinion of the Supreme Court of the State of New York for the County of Suffolk reported and cited as follows: 91 Misc. 2d 481,

398 NYS 2d 311 (1977) appears in Appendix C, *infra* page 64. The petition for reargument in the Court of Appeals, State of New York, was denied without opinion on April 3, 1979.

JURISDICTION.

The order of the Court of Appeals of the State of New York was entered on February 13, 1979. See Appendix A, *infra* page 26. A motion by petitioner for reargument was denied by order of the Court of Appeals of the State of New York, dated April 3, 1979. This petition for certiorari was filed less than 90 days from the date petitioner's motion for reargument was denied as aforesaid. The jurisdiction of this Court is invoked under 28 USC §1257 (2) and/or (3).

QUESTIONS PRESENTED.

Petitioner, David Abramovich, a school teacher tenured under the laws of the State of New York, was fired from his teaching position by his employing Board of Education, without charges being brought against him and without a tenure hearing.

The questions thereby arising are:

FIRST: Can a tenured teacher be removed from his teaching position without being given any written notice of tenure charges, nor any opportunity for a hearing prior to his dismissal?

SECOND: Can a tenured teacher waive his 14th amendment due process rights as embodied in the tenure statutes of New York State (Education Law--Section 3020-a) in advance of their actual accrual?

THIRD: Assuming that petitioner waived his right to a tenure hearing, but did not

waive his right to be advised of charges against him, were his due process rights violated by the failure of his employing Board of Education to advise him of the specific charges against him?

FOURTH: Was a stipulation which petitioner David Abramovich and his employing Board of Education entered into so arbitrary and so unfair as to constitute a deprivation of his rights without due process of law?

FIFTH: Did the New York State Education Law in effect in New York State at the time petitioner entered into a stipulation prevent petitioner, David Abramovich, from voluntarily waiving his right to a tenure hearing?

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States, Amendment XIV Section #1:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ."

**Section 3013 (2) of the New York State Education Law:*

". . . Such persons (tenured teachers) shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law (Education Law): (a) Insubordination, immoral character, or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty . . ."

* Section 3013 of the New York State Education Law was repealed on June 19, 1978. This section is now controlled by Section 3012 of the New York State Education Law.

***Section 3020-a of the New York Education Law:*

"1. Filing of Charges--All charges against a person enjoying the benefit of tenure as provided in . . . sections . . . three thousand twelve, three thousand thirteen . . . of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve."

** Section 3020-a was amended on April 15, 1977, requiring the Board of Education to implement the recommendations of the hearing panel. At the time David Abramovich entered into the subject stipulation, the Board of Education was not bound by the recommendations of the hearing panel. Copies of these statutes are contained in Appendix E (p. 131).

Section 3020-a (4) of the New York State Education Law:

"(4) Post Hearing Procedures--Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty, if one is warranted, to the employee and to the clerk of the employing board. Within five days of receipt of such hearing report, the employing board shall *determine* the case by a vote of a majority of all the members of such board and fix the penalty or

punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal . . ."

STATEMENT OF THE CASE.

The Petitioner, David Abramovich, is an elementary school teacher, certified by the State of New York. In February, 1968, petitioner Abramovich was appointed as a special education class teacher by the Board of Education of the towns of Brookhaven and Smithtown in Suffolk County, New York (Respondent, School District).

In April, 1971, petitioner Abramovich was notified that he had been appointed to tenure by the Board of Education effective September 1, 1971. Thereafter, petitioner Abramovich continued to teach in the Central School District No. 1 as a tenured teacher.

In May, 1975, certain charges were filed against petitioner Abramovich by his employing Board of Education, and in accordance with the New York Education Law then in effect, he was given notice of the nature of those charges against him. Subsequent to receiving the notice of charges, petitioner Abramovich requested a tenure hearing pursuant to the provisions of Section 3020-a of the Education Law. Accordingly, a hearing panel was selected and a hearing officer was assigned by the Commissioner of Education of the State of New York.

In September, 1975, a tenure hearing was commenced. The first session was very brief with only one witness for the employing school board being called. After a short period of testimony by the witness under questioning by the employing school board's attorneys, discussions were commenced by the parties concerning the possibility of

settlement. The tenure hearing was adjourned and on October 7, 1975, a stipulation of settlement was entered into by petitioner Abramovich and Respondent, employing Board of Education.

In consideration of the pending charges against him being dismissed with prejudice, petitioner Abramovich was asked to and did agree to a unique format, whereby he would be subject to dismissal at a future date. It is important to note, however, that under the provisions of the stipulation, petitioner Abramovich never resigned and never gave up his tenure rights, but retained his status as a tenured teacher.

The significant terms of the stipulation contained in Appendix D, page 89, were as follows:

(A) From the date of the resolution of approval by his employing Board of Education (of the stipulation) until the beginning

of the fall academic term, September, 1976, petitioner Abramovich was required to take a leave of absence without pay.

(B) Commencing in September, 1976, petitioner Abramovich was to resume employment with the employing Board of Education as an intermediate grade tenured teacher at the Mount School, whose principal was one John Burns. Petitioner further agreed to continue in that teaching position until the Christmas vacation of 1976, at which time he was to be advised by John Burns, acting in his sole discretion, whether or not petitioner was to continue as a teacher in the school district.

(C) Finally, this tenured teacher, (petitioner) was to waive his rights to notice of future unknown charges and a future hearing under Section 3020-a of the Education Law in the future event that Mr. Burns

determined that petitioner was not to be retained in his teaching position.

(D) The standards to be followed by John Burns included the vague and undefined statement, ". . . the professional standards which are appropriate to be applied." (Appendix D, page 95)

In September, 1976, petitioner, who was still a tenured teacher, assumed his duties at the Mount School. He continued to teach there until Christmas vacation in December, 1976. At that time, he was advised that John Burns, his school principal, had decided not to retain him as a teacher. Petitioner never received notice of any specific charges which could form the basis for his dismissal, nor was he offered the opportunity for a hearing to contest the merits of the decision to terminate him. After his dismissal, petitioner commenced

proceeding in accordance with the New York State law challenging his dismissal as being arbitrary, capricious, and an attempt by the employing Board of Education to bypass the statutory mandates of the New York State Education Law and in contravention of the public policy of that state and his Fourteenth Amendment constitutional right not to have his property taken from him without due process of law.

Special Term, Supreme Court of the State of New York, County of Suffolk, held that, "It was a violation of petitioner's right to a hearing and due process for the principal to recommend his (Petitioner, David Abramovich) dismissal without notice and a hearing." (Appendix C, page 83)

John Burns, an employee of the school district, took no oath of office, had unchecked discretion and was accountable to no one. His guidelines were vague and arbitrary.

In summary, the procedure set forth in the stipulation calling for a waiver of petitioner's right to a hearing in advance of its accrual could not be considered a knowing waiver and that fact, coupled with the vague guidelines and the arbitrary powers given to John Burns, created a situation where the risk of unfairness was intolerably high and thus, fundamentally violated petitioner's due process rights.

REASONS FOR GRANTING THE WRIT.

THE HOLDING OF THE COURT OF APPEALS CLEARLY CONFLICTS WITH THE DUE PROCESS PRINCIPLES ENUNCIATED IN THE FOURTEENTH AMENDMENT.

In May, 1975, the employing Board of Education had made a finding of probable cause against petitioner Abramovich as to charges of incompetency brought against him by Val Harto, assistant principal of employing Board of Education. Under Section 3020a subdivision 4 of the Education Law

of the State of New York then in effect, the employing Board of Education was to act as adjudicator of petitioner Abramovich's continued employment as a teacher within the school district. Section 3020-a of the Education Law of the State of New York was held to be unconstitutional in the case of *Kinsella v. Board of Education* 378 Fed. Supp. 54 (Feb. 20, 1974), but on February 28, 1974, the New York State Board of Regents approved amended regulations which eliminated the unconstitutional characteristics of that section. On April 15, 1977, the State Legislature amended the said Section 3020-a so as to eliminate the employing Board's functions of adjudicator.

This Court has long recognized that a tenured teacher has a right to continued employment which cannot be taken away from him without due process of law.

In *Perry v. Sindermann*, 408 V.S. 593 at page 601, this Court said:

> "A written contract with an explicit tenure provision clearly is conclusive of a formal understanding that supports a teacher's claim to continued employment unless sufficient 'cause' is shown."

In *Board of Regents v. Roth*, 408 V.S. 564, this Court said:

> "The fourteenth amendment's procedural protection of employment is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests may take many forms."

The State of New York has long recognized that its tenured teachers have a constitutionally protected right to employment and such right cannot be taken from them without due process of law.

SEE: *Bevan v. New York State Teachers' Retirement System*, 74 Misc. 2d 443, 345 NYS 2d 941, affirmed 44 AD 2d 163, 355 N.Y. 2d 185; *Jerry v. Board of Education*, 75 Misc. 2d 461, 347 N.Y.S. 2d 917; *Harris v. Mechanicville Central School District*, 86 Misc. 2d 144, 382 N.Y.S. 2d 251.

In the instant case, petitioner Abramovich was a tenured teacher. He and the Board of Education entered into a stipulation and he was subsequently dismissed from his teaching position pursuant to the terms of that stipulation without a tenure hearing or a written reason for his dismissal.

Petitioner Abramovich contends that the procedure of removing him from his position (as set forth in the stipulation), was violative of his due process rights under the Fourteenth Amendment to the United States Constitution for the following reasons:

(A) John Burns, who was called upon to act as adjudicator, was a mere employee of the Board of Education, and was not part of respondent Board and as such should not have been placed in the dual role of investigator and adjudicator.

(B) Petitioner Abramovich waived in advance his opportunity to be confronted with future charges and the opportunity for a future hearing.

(C) The principal, John Burns, a party not under oath, and accountable to nobody, was authorized to evaluate petitioner in his unchecked discretion and for reasons "valid or otherwise" to dismiss petitioner.

Concededly, any litigant in a legal or quasi-judicial proceeding may waive his due process rights to be advised of charges against him and of a hearing of those charges, but that waiver must be voluntary, knowing and intelligently made, and must not be a contract of adhesion, where there is great disparity in bargaining power. See: *D.H. Overmyer Co., Inc. of Ohio v. Frick Company* 405 U.S. 174.

The question in this case is whether petitioner Abramovich made a valid waiver of his right to due process.

In *Watson v. Branch County Bank* 380 F. Supp. 945 at page 974, the Court stated:

> ". . . However, the validity and effectiveness of the waiver is a matter of federal constitutional law, not state contract . . ."

> ". . . There is no universal standard that must be applied in every situation where an individual foregoes a constitutional right . . ."
>
> ". . . The standard to be applied will depend upon the nature of the right being waived and the circumstances under which the alleged waiver was made . . ."

Again on page 975 of *Watson supra*, the Court states:

> ". . . Have the plaintiffs in this case made a valid waiver of their right to due process? Where fundamental constitutional rights of due process are at stake, whether in a

civil or criminal context, courts indulge every reasonable presumption against waiver . . ."

In this case, petitioner Abramovich claims that the combination of investigative and adjudicative functions of the employing board created an atmosphere of duress which, coupled with waiver of unknown charges and under the jurisdiction of a man (John Burns) under no oath, with no legal duty to adjudicate fairly (for valid reasons or otherwise) present special facts and circumstances creating a risk of unfairness which was intolerably high and hence violative of due process.

This Court stated in *Withrow et al vs. Larkin* 421 U.S. 35 at pages 46-47:

P. 46 "Concededly, a fair trial in a fair tribunal is a basis requirement of due process . . ."

P. 47 "Not only is a biased decision maker constitionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness . . ."

Petitioner asserts that to sanction the stipulation in this case fosters rather than prevents the probability of unfairness and hence should be struck down.

CONCLUSION.

For the reasons set forth *infra*, Petitioner, David Abramovich, respectfully prays that a Writ of Certiorari be issued

by this Honorable Court to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

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Counsel for Petitioner,
David Abramovich

Francis M. Neary
Jeffrey Michael Conforte
On the Petition

June 12, 1979

APPENDIX A.

Here are set forth, respectively, the opinion in the New York Court of Appeals.

46 N.Y.2d 450

- X

IN THE MATTER

of

DAVID ABRAMOVICH,

Appellant,

v.

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, also known as Three Village Central School District No. 1,

Respondent.

- X

Court of Appeals of New York.

Feb. 13, 1979.

Appeal was taken from judgment of Supreme Court, Special Term, Suffolk County, Leon D. Lazer, J., 91 Misc.2d 481, 398 N.Y.S.2d 311, which directed teacher's reinstatement to his position.

The Supreme Court, Appellate Division, reversed, 62 A.D.2d 252, 403 N.Y.S.2d 919, and further appeal was taken. The Court of Appeals, Fuchsberg, J., held that a tenured school teacher could, as part of stipulation in settlement of a disciplinary proceeding brought against him, waive his continued right to protections afforded by Education Law provision concerning tenured teacher termination hearings, should school principal decide that teacher should be terminated following designated period of employment and evaluation, where stipulation was reached only after exhaustive discussion among counsel for board, teacher, his lawyer, hearing officer and teacher's union representative and, at teacher's personal request, entire stipulation had been reread point by point for his

approval even after it had been put on record.

Order of Appellate Division affirmed.

Stipulations Key 3

A tenured school teacher could, as part of stipulation in settlement of a disciplinary proceeding brought against him, waive his continued right to protections afforded by Education Law provision concerning tenured teacher termination hearings, should school principal decide that teacher should be terminated following designated period of employment and evaluation, where stipulation was reached only after exhaustive discussion among counsel for board, teacher, his lawyer, hearing officer and teacher's union representative and, at teacher's personal request, entire stipulation had been

reread point by point for his approval even after it had been put on record. Education Law §3020-a.

Francis M. Neary, P.C., and Jeffrey Michael Conforte, Huntington, for appellant.

Peter V. Snyder and Kevin A. Seaman, Patchogue, for respondent.

OPINION OF THE COURT.

FUCHSBERG, Judge.

We hold that, in appropriate circumstances such as exist in this case, a tenured teacher may, as part of a stipulation in settlement of a disciplinary proceeding brought against him, waive his or her continued right to the protections afforded by section 3020-a of the Education Law.

In this article 78 proceeding, petitioner, David Abramovich, an elementary school teacher, challenged such a stipulation as violative of public policy, a view with which Special Term agreed. Following appeal, the Appellate Division entered a unanimous order of reversal. On further appeal to this court by petitioner pursuant to CPLR 5601 (subd. [a], par. [ii]), we now uphold that determination.

In May, 1975, the petitioner was charged with 49 specific counts of insubordination, incompetency and neglect of his teaching duties. In due course, a hearing on the charges as required by section 3020-a got underway. Petitioner was not only represented by counsel but advised as well by a union field representative and the president of the

teachers' association of which he was a member. On the third day of the hearing, after the board of education had presented written and oral testimony in support of the charges and after consultation between the petitioner and those representing him, the parties, with the concurrence of their representatives, entered into the settlement in question.

The stipulation of settlement, in essence, provided that Abramovich was to continue as a teacher, thus avoiding the substantial risk of dismissal that was entailed in allowing the hearing to go to decision, but left him subject to future dismissal, if, after a designated period of employment, his work was not found satisfactory. In implementation of the stipulation the board was to withdraw all of its charges with prejudice,

thereby surrendering its right to have tried him on any of the 49 charges that had been brought against him. For his part, petitioner was to take an unpaid leave of absence until the commencement of the 1976 fall school term, when he would be re-employed, but at a different school and under a new principal. Moreover, to reinforce the likelihood that his future teaching skills would show improvement, it was agreed that, at least nine months prior to the commencement of petitioner's re-employment, the board would provide him with a written list of areas in which he was considered deficient and the new school principal would supply written criteria setting forth the standards by which his future performance was to be judged. During his leave of absence, in order to improve his

capabilities, the board also undertook to utilize this time to afford him instruction in specialty teaching areas such as remedial reading along with the opportunity to observe the teaching techniques utilized by other members of his new school's faculty. After all this, at the conclusion of the four-month term starting with the teacher's September, 1976 reassignment and ending that Christmas, the new principal was to appraise petitioner's performance and determine whether his services were to be retained. This decision was to be unappealable by either the petitioner or the board.

It is not disputed that the board carried out its part of the bargain. But, when, in December, 1976, the evaluation made by the principal of the new school was unfavorable to the teacher and

he was dismissed, he thereafter instituted the present proceeding. Emphasizing that section 3020-a establishes the exclusive means for the dismissal of a tenured teacher and relying largely on *Matter of Boyd v. Collins*, 11 N.Y.2d 228, 228 N.Y.S.2d 228, 182 N.E.2d 610, he contends that, no matter the circumstances under which it may be arrived at, even the most voluntary of agreements between the parties waiving the protections of the section is an impermissible bypass of the very thing the statute is intended to secure. It is in this claimed circumvention that he would have us find public policy is offended.

Clearly, the statute does form a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic

caprice (see *People ex rel. Callahan v. Board of Educ.*, 174 N.Y. 169, 178, 66 N.E. 674, 677; *Matter of Monan v. Board of Educ.*, 280 App. Div. 14, 18, 111 N.Y.S 2d 797, 800). To that end, section 3020-a and the regulations promulgated thereunder by the Commissioner of Education (8 NYCRR 82.10, 82.11) attempt to harmonize the method of removing tenured teachers with the dictates of procedural due process (see *Matter of Amos v. Board of Educ.*, 54 A.D.2d 297, 304, 388 N.Y.S. 2d 435, 440, affd. 43 N.Y.2d 706, 401 N.Y.S.2d 207, 372 N.E.2d 41; *Hodgkins v. Central School Dist. No. 1*, 48 A.D.2d 302, 304-305, 368 N.Y.S.2d 891, 893). These regulations are specific. Among other things, they require that all charges be in writing; that a determination that probable cause exists be made by a

vote of a majority of all the members of the employing board before a formal written notice specifying the charges in detail and outlining the accused employee's rights is served upon him; and that an opportunity be provided for a hearing at which the teacher has the right to be represented by counsel, to testify and to subpoena and cross-examine witnesses (Education Law, §3020-a, subds. 1-3). Indisputably, up to the point at which a mutually agreeable disposition was reached between the parties in the case before us, each of these steps had been followed faultlessly.

We do not gainsay the importance of these standards both in terms of their role in protecting the rights of individual teachers whose years of satisfactory service have earned them this security

and in fostering an independent and professional corps of teachers. It follows that the shield of section 3020-a is not lightly to be put aside. But that does not mean that it is never waivable. For, when a waiver is freely, knowingly and openly arrived at, without taint of coercion or duress, the sturdy public policy underpinnings of section 3020-a are not undermined.

Indeed, the contention that public policy absolutely forbids waiver of section 3020-a rights is negated by examination of the statute itself. In that connection, we first observe that the statute contains no express provision preventing a teacher from waiving its benefits (cf. *Estro Chem. Co. v. Falk*, 303 N.Y. 83, 86-87, 100 N.E.2d 146, 148). At least somewhat to the contrary,

subdivision 2 expressly conditions waiver of the right to a hearing upon the teacher's "unexcused failure" to notify the board of the desire for such a hearing within 10 days of receipt of the charges; having authorized waiver by simple neglect, the statute need not be so broadly read as to prohibit the petitioner from doing so of his own free will, particularly when acting with the assistance of counsel. Especially is this so when the waiver serves as the quid pro quo for countervailing benefits, here the dismissal of the flood of charges for which the teacher was already on trial, so that he might have what he apparently regarded as a better opportunity, albeit on mutually and carefully delineated terms, to retain his position. And, as petitioner himself concedes,

obviously a tenured teacher always has the option to resign, whether for the reason to which we have alluded or for any other that pleases him; so the waiver in the present case may be viewed as no more than a voluntary resignation *in futuro*. In thus indicating that section 3020-a is not so sacrosanct as to be impervious to waiver under all circumstances, we overrule *Matter of Boyd v. Collins*, 11 N.Y.2d 228, 228 N.Y.S.2d 228, 182 N.E.2d 610, *supra*.

Moreover, our holding today conforms with a competing public policy favoring the nonjudicial resolution of legal claims - a means of facilitating the vindication of rights without having to endure the travail and vicissitudes of litigation (see, e.g., *Matter of Beekman-Downtown Hosp. v. Whallen*, 44 N.Y.2d 124,

134, 404 N.Y.S.2d 335, 340, 375 N.E.2d 395, 400; *Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 247 N.Y. 435, 445, 160 N.E. 778, 781 [common-law litigation]; cf. *Matter of Maye [Bluestein]*, 40 N.Y. 2d 113, 117-118, 386 N.Y.S.2d 69, 71-72, 351 N.E.2d 717, 719-720; *Antinore v. State of New York*, 49 A.D.2d 6, 8, 371 N.Y.S.2d 213, 214, affd. 40 N.Y.2d 921, 389 N.Y.S.2d 576, 358 N.E.2d 268 [arbitration]). It is no derogation of the trial process to recognize that voluntary composition of differences, arrived at, in whole or in part, by parties themselves, does not necessarily result in a lesser order of justice than an all-or-nothing decision imposed by judicial or other authority. Not surprisingly then, the comprehensive range of matters on which agreements between litigants or

potential litigants is enforceable long ago came to include "stipulat[ing] away statutory, and even constitutional rights" (*Matter of New York, L. & W.R.R. Co.*, 98 N.Y. 447, 453; see, also, *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165-166, 371 N.Y.S.2d 687, 689, 332 N.E.2d 867, 869; *Cullen v. Naples*, 31 N.Y.2d 818, 339 N.Y.S.2d 464, 291 N.E.2d 587).

Judicial acceptance of compromises in which the most fundamental of rights are waived is not uncommon. Plea bargaining - to focus on one obvious example - may entail a compromise whereby the accused in return for sentence leniency may voluntarily and knowingly waive his right to have the State prove his guilt beyond a reasonable doubt (see, generally, *People v. Francis*, 38 N.Y.2d 150, 155-156, 379 N.Y.S.2d 21, 25-26, 341

N.E.2d 540, 543, and authorities cited therein). Similarly, litigation settlements, if "not lightly, inadvertently, inadvisedly or improvidently" entered into, may be effective waivers of legal claims (*Yonkers Fur Dressing Co. v. Royal Ins. Co.*, *supra*, at 247 N.Y. p. 446, 160 N.E. at p. 781). The binding effect of agreements to submit disputes to arbitration, for most purposes foregoing resort to the courts, provides yet another illustration (see *Rico Tit. Co. v. Persichilli Homes*, 64 Misc.2d 306, 307, 312 N.Y.S.2d 515, 516; cf. *Matter of Writers Guild of Amer. East* [*Prockter Prods.*], 1 N.Y.2d 305, 308, 152 N.Y.S.2d 466, 468, 135 N.E.2d 204, 206). Of the latter, relevant for the public employment case before us has been the approval of arbitration as a substitute for some of the

statutory procedures safeguarding civil service employees from arbitrary, capricious and unreasonable removal (see *Antinore v. State of New York*, *supra*; cf. *Matter of Boyd v. Collins*, 11 N.Y.2d 228, 235, 228 N.Y.S.2d 228, 234, 182 N.E.2d 610, 614 [dissenting opn.], *supra*), and, more particularly, our sanctioning of arbitration as an alternative to the review procedures of section 3020-a (subd. 5) (see *Board of Educ. v. Associated Teachers of Huntington*, 30 N.Y.2d 122, 131-132, 331 N.Y.S.2d 17, 24-25, 282 N.E. 2d 109, 114-115). Thus, the principles that pervade our treatment of compromise stipulations and waivers in other areas reinforce our conclusion that section 3020-a need not be construed as prohibiting petitioner's waiver.

Returning to the facts of this case, we emphasize that the settlement here could hardly have manifested a clearer instance of a petitioner's voluntary relinquishment of known rights. The stipulation was reached only after exhaustive discussion among counsel for the board, petitioner, his lawyer, the hearing officer and the teachers' union representative. The record discloses that its ramifications were fully explored. At various points in the articulation of the agreement, petitioner conferred with his counsel and the others. Furthermore, at the teacher's personal request, the entire stipulation was reread point by point for his approval even after it had been put on the record.

To further insure that petitioner fully comprehended the import of what was

being reread, the hearing officer painstakingly and in no uncertain terms inquired not only into the petitioner's understanding of its precise conditions but also as to his grasp of the nature and extent of the rights he was waiving.* It was not until the officer was satisfied on these that he accepted and

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* For example, this exchange forms part of the record:

"THE HEARING OFFICER: * * * Do you understand, Mr. Abramovich, that you have a right not to settle this case, that you have a right to continue with this hearing?

"THE WITNESS: Yes.

"THE HEARING OFFICER: And defend yourself on the pending charges?

"THE WITNESS: Yes.

"THE HEARING OFFICER: You have a right, in other words, to put the School Board to the proof and prove the charges against you.

"THE WITNESS: Yes.

"THE HEARING OFFICER: All right. And, that your rights are guaranteed under Section 3020-a of the Education Law?

"THE WITNESS: Yes I do.

"THE HEARING OFFICER: All right. And, in entering into the settlement, you understand that you are giving up your right to have a continuance of this hearing?

"THE WITNESS: Yes."

approved it. Certainly, the undisputed facts before us, the careful and counseled negotiations between the parties and, particularly, the absence of any claim of duress on the part of the board, leaves no possibility that there was other than a voluntary and effective waiver. Indeed, even now, from the vantage point of hindsight, petitioner does not seriously controvert his acceptance and understanding of the terms of the stipulation or the board's good faith in entering into it.

For all these reasons, the order of the Appellate Division should be affirmed.

COOKE, C.J., and JASEN, GABRIELLI, JONES and WACHTLER, JJ., concur with FUCHSBERG, J.

Order affirmed, with costs.

APPENDIX B.

Here is set forth the opinion of the Appellate Division of the Supreme Court, New York State, Second Department.

62 A.D.2d 252

- X

IN THE MATTER

of

DAVID ABRAMOVICH,

Respondent,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, etc.,

Appellant.

- X

Supreme Court, Appellate Division,

Second Department.

April 17, 1978.

Appeal was taken from a judgment of the Supreme Court, Special Term, Suffolk County, Leon D. Lazer, J., 91 Misc.2d 481, 398 N.Y.S.2d 311, which directed petitioner's reinstatement to his position

as a teacher. The Supreme Court, Appellate Division, Suozzi, J., held that under all circumstances, including the fact that all parties whose combined voices go to formulate public policy participated in the settlement and where the agreement had give and take on both sides and the teacher was fully advised by counsel, a settlement whereby the teacher, as a quid quo pro for a second chance to retain his job, waived his right to a tenured teacher termination hearing if school principal decided that he should be terminated did not violate public policy and was enforceable.

Reversed.

1. Constitutional Law Key 43(1)

Estoppel Key 52.10(1)

Although waiver of statutory or even constitutional rights has long been

recognized as acceptable so long as it is done intelligently and voluntarily, no effect will be given to a waiver which violates public policy.

2. Stipulations Key 3

Stipulation whereby tenured teacher, with the advice of counsel and in return for withdrawal of disciplinary charges, waived his right to tenured teacher termination hearing is school principal decided that teacher should be permanently terminated after a trial period was not void as against public policy. Education Law § 3020-a.

3. Schools and School Districts Key 133.8

The public policy expressed in the tenure statutes is designed to protect individual teachers, as public servants, from being dismissed without a hearing

once their competency has been demonstated. Education Law § 3020-a.

4. Schools and School Districts Key 133.9

While there is a public interest in retaining quality school teachers, the primary benefits of the tenure statutes are enjoyed by the individual tenured teacher and, therefore, such individual teacher may waive tenure protections under circumstances that show that the teacher is not being coerced or exploited by an omnipotent board of education. Education Law § 3020-a.

5. Stipulations Key 19

Where all parties whose combined voices go into formulation of public policy participated in stipulation whereby tenured teacher waived certain rights in exchange for a second chance to retain

his job and where the stipulation had give and take on both sides, and the school board acted openly and fairly and the teacher was fully advised by counsel, stipulation was effective and enforceable. Education Law § 3020-a.

6. Schools and School Districts
Key 141(5)

A board of education has the right to negotiate settlements of teacher removal proceedings in the best interest of the taxpayers of the district.

7. Schools and School Districts
Key 141(5)

A board of education is not prevented by public policy from dealing openly and flexibly with a tenured teacher in an effort to arrange a settlement that attempts to correct teacher's deficient

skills while perhaps staving off his termination.

Pelletreau & Pelletreau, Patchogue (Peter V. Snyder, Patchogue, of counsel, Kevin A. Seaman, Patchogue, on brief), for appellant.

Francis M. Neary, P.C., Huntington (Jeffrey Michael Conforte, Huntington, on brief), for respondent.

Before HOPKINS, J. P., and TITONE, SUOZZI and MARGETT, JJ.

SUOZZI, Justice.

The issue presented for review on this appeal is whether the stipulation entered into by the parties, in which petitioner waived his tenure rights under section 3020-a of the Education Law in exchange for appellant's withdrawal

of disciplinary charges against him, is void as against the public policy of this State. Special Term held that the tenure laws are rooted in public policy to such an extent that they cannot be bargained away by an individual teacher. We reverse and hold that the stipulation was effective and enforceable.

Petitioner was a tenured teacher employed by the appellant school district. In May, 1975 the Board of Education filed charges against him based on 49 alleged incidents of misfeasance in an effort to effect his removal. A tenured teacher termination hearing pursuant to section 3020-a of the Education Law was commenced in September, 1975. After two sessions of the hearing had been held, a settlement was reached between the parties and a stipulation was entered into. In consideration of the withdrawal of the

charges with prejudice, petitioner agreed to waive, *in futuro*, certain statutory tenure rights. The significant terms of the stipulation were as follows: (1) petitioner was required to take a leave of absence of approximately one academic year; (2) commencing in September, 1976, petitioner was to be rehired by respondent as an intermediate grade teacher at the Mount School, whose principal was one John Burns; (3) at Christmas vacation of 1976, Burns was to advise petitioner whether he was to continue as a teacher; (4) petitioner waived his right to a hearing pursuant to section 3020-a before such possible termination; and (5) appellant was to send petitioner a written explanation of the evaluation criteria Burns would use, as well as advice on how to improve his teaching skills.

Petitioner was fully attended by counsel and was thoroughly queried to make sure he understood and consented to all parts of the agreement. Only then did the hearing officer approve the stipulation.

All of the terms of the stipulation were fulfilled. Come Christmas vacation of 1976, petitioner was deemed unqualified and his employment was terminated. He now contends that the stipulation bypassed the statutory mandates of the Education Law, the public policy of this State, and should be voided. We disagree.

[1, 2] Although the waiver of statutory or even constitutional rights has long been recognized as acceptable practice so long as it is done intelligently and voluntarily, no effect will be given to a waiver which violates public

policy (see *Estro Chem. Co. v. Falk*, 303 N.Y. 83, 87, 100 N.E.2d 146, 148; *Rosen v. New York City Teachers' Retirement Bd.*, 282 App. Div. 216, 218, 122 N.Y.S.2d 485, 487, affd. 306 N.Y. 625, 116 N.E.2d 239). Petitioner, with the advice of counsel and as a *quid pro quo* for a "second chance" to retain his job, waived his right to a hearing. Rather than take a chance on what he must have viewed as probable dismissal after the hearing, he accepted the stipulation, which offered the prospect of job retention. Such a settlement does not violate public policy.

First, all of the parties whose combined voices go into the formulation of public policy participated in the settlement. The Board of Education represented the taxpayers of the district; the teachers' union represented the broader

interest of all teachers in the district; petitioner's own counsel represented the individual rights of his client; and the hearing officer represented the legislative intent as expressed in the Education Law. Such a wide range of input assures an agreement protective of the public interest.

[3, 4] Second, the public policy expressed in the tenure statutes is designed to protect individual teachers, as public servants, from being dismissed without a hearing once their competency has been demonstrated. It is a form of job security which insures stability in the educational system. While there is certainly a *public* interest in retaining quality teachers, the primary benefits of the tenure statutes are enjoyed by the individual tenured teacher. Since they protect the individual teacher, the

individual teacher may waive their protections under circumstances which show that the teacher is not being coerced or exploited by an omnipotent board of education.

[5] This was not an oppressive or unconscionable contract of adhesion. Rather, the board offered petitioner a second chance to keep his job, along with the necessary advice on how to improve. The agreement had give and take on both sides. To hold, as did Special Term, that "[t]he procedure for removal of teachers provided for in the tenure statue * * * is the *exclusive* method for dismissal of teachers with tenure" (91 Misc.2d 481, 485, 398 N.Y.S.2d 311, 315; emphasis in original) is to unnecessarily preclude imaginative compromise. Instead, every tenured teacher would be forced to face hearings and dismissal whenever

charges were brought. Petitioner was able to bargain for a "second chance" and the district, acting in good faith, was able to spare the expense of having to bring him up on charges a second time. Obviously, if there were not a reasonable chance that the charges against petitioner would have been sustained at the first hearing, he would not have bargained away his right to a later hearing. So long as the board acts openly and fairly, as it did here, and the teacher is fully advised by counsel, public policy should not prevent such stipulations.

[6] Third, the stipulation was more in the nature of a settlement of a quasi-judicial proceeding than a pure waiver. A board of education certainly has the right to negotiate settlements of removal proceedings in the best interest of the taxpayers of the district (*Matter*

of Cedar v. Commissioner of Educ. of State of N. Y., 53 Misc.2d 702, 279 N.Y.S.2d 661, affd. 30 A.D.2d 882, 291 N.Y.S.2d 719). The holding in *Matter of Boyd v. Collins*, 11 N.Y.2d 228, 228 N.Y.S.2d 228, 182 N.E.2d 610 is not to the contrary. There, a board of education attempted to remove a tenured teacher, without charges and without a hearing, by paying her a year's salary for not teaching. The teacher did not initially accept these terms but was simply told by the board not to return to the classroom. Finally, the board did not fulfill the promises it had made in the agreement. Here the hearing was already underway when the settlement was reached. Petitioner voluntarily gave up his tenure rights under the advice of counsel. The settlement was approved by an impartial

hearing officer and all of its terms were fulfilled.

[7] A board of education is not prevented by public policy from dealing openly and flexibly with one of its tenured teachers in an effort to arrange a settlement which attempts to correct the teacher's deficient skills while perhaps staving off his termination.

Judgment of the Supreme Court, Suffolk County entered August 29, 1977, reversed, on the law, without costs or disbursements, and proceeding dismissed on the merits.

HOPKINS, J. P., and TITONE and MARGETT, JJ., concur in the opinion of SUOZZI, J.

APPENDIX C.

Here is set forth the opinion of the Supreme Court of New York, Suffolk County.

91 Misc.2d 481

- X

Application of DAVID ABRAMOVICH,

Petitioner,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, SUFFOLK COUNTY, New York, a/k/a Three Village Central School District 1,

Respondent,

for a mandamus under Article 78 of the Civil Practice Law and Rule and Section 3013 of the Education Law of Termination by the respondent dismissing the petitioner from a position as a teacher.

- X

Supreme Court, Special Term,

Suffolk County, Part I.

July 21, 1977.

Discharged tenured teacher brought Article 78 proceeding seeking written notice of charges and a hearing. The

Supreme Court, Special Term, Suffolk County, Leon D. Lazer, J., held that: (1) stipulation whereby teacher, in return for dismissal of charges, waived right to notice or hearing if principal decided that he should be terminated following subsequent three months' trial period was void as against public policy and (2) fact that teacher waited until after school board exercised its right under the stipulation did not bar instant proceedings on ground of laches.

Petition granted.

1. Schools and School Districts

Key 133.10

A tenured teacher can terminate a hearing by simply resigning, thereby effectively forfeiting tenure rights. Education Law § 3020-a, subd. 2.

2. Constitutional Law Key 43(1)

Estoppel Key 52.10(4)

As a general rule, a party may waive a statutory or even a constitutional provision enacted for his benefit or protection where it is exclusively a matter of private right and no considerations of public policy or morals are involved; however, a statutory right conferred on a private party affecting the public interest may not be waived or released if such waiver or release contravenes statutory policy; a party cannot in advance make a valid promise that a statute founded in public policy shall be inoperative.

3. Constitutional Law Key 277(2)

Tenured teachers cannot be deprived of their constitutionally protected

interest in the right to employment and compensation therefor without due process of law.

4. Contracts Key 108(2)

A party cannot in advance make a valid promise that a statute founded in public policy shall be inoperative; public policy is interest of others than the parties and such interest may not be set at naught by the acts or conduct of any party alone.

5. Stipulations Key 11

Stipulation whereby tenured teacher, in return for dismissal of charges, waived right to notice or hearing if principal decided that he should be permanently terminated following three months' "trial period" was void as against public policy, notwithstanding want of

showing of bad faith on part of school board or that criteria on which principal's determination was to be based were to be furnished teacher or that in executing stipulation the teacher was represented by counsel. Education Law § 3020-a, subd. 2.

6. Schools and School Districts
Key 141(5)

Procedure for removal of teachers provided for in the tenure statute is the exclusive method for dismissal of teachers with tenure; such rights may not be waived. Education Law § 3020-a, subd. 2.

7. Schools and School Districts
Key 133.9

An attempt by a school board to temporarily appoint a tenured teacher to a

permanent position is deemed to be an attempt to evade the tenure laws. Education Law § 3020-a, subd. 2.

8. Schools and School Districts
Key 133.5, 135(3)

A board of education has no power to make contracts with its employees which are not authorized in statute; a board may not establish trial periods for its employees except in conformity with the Education Law.

9. Equity Key 87(2)

Laches is no defense where the relief sought is a matter of right rather than indulgence, at least as long as the statutory limitation period is complied with.

10. Mandamus Key 143(2)

Laches was no bar to Article 78 proceeding brought by discharged, tenured teacher challenging agreement whereby he attempted to waive tenure rights, notwithstanding that suit was not brought until board of education exercised its right under the agreement, especially absent allegation that proceeding was not commenced within the statutory period after the invalid dismissal; furthermore, lapse of time without showing of prejudice is no defense. CPLR 7801 *et seq.*; Education Law § 3020-a, subd. 2.

Francis M. Neary, Huntington, for petitioner.

Pelletreau & Pelletreau, Patchogue, for respondent.

LEON D. LAZER, Justice.

In this Article 78 proceeding, a discharged teacher seeks judgment directing the respondent Board of Education of the Three Village Central School District (the "Board") to advise him in writing of the charges against him, to hold a hearing on those charges, to reinstate him during the interim, and to pay his back salary from January 1, 1977 to the date of the commencement of this proceeding. The Board has filed an answer and moved to dismiss the proceeding on the ground that petitioner had previously waived his right both to a notice of charges and a hearing. The facts are relatively undisputed.

On May 28, 1975 the petitioner, who was a tenured K-6 teacher, received formal notices from the Board charging him

with incompetence, insubordination, neglect of duty and other unsatisfactory conduct in the performance of his duties. A hearing on the merits of the charges was scheduled and the local bargaining agent, the Three Village Teachers Association, retained counsel to represent the petitioner. On October 7, 1975, the second day of the hearing, petitioner and the Board entered into a stipulation of settlement in which it was agreed that the pending charges would be dismissed with prejudice, that, in consideration of the dismissal, petitioner would take a year's leave of absence without pay, that the Board would permit him to resume his teaching duties from September 1976 to December 1976 at one of the elementary schools where he had previously taught, and that during this period the school principal would determine in his

sole discretion whether petitioner's employment should be permanently terminated. The principal's decision was to be based solely upon petitioner's performance during his resumption of duties without any consideration of the prior charges against him. Although the criteria upon which the principal's determination was to be based were to be furnished petitioner, the decision of the former was to be final. It was further agreed that the petitioner "waives his right to a 3020A Hearing in the event that [the principal] determines at Christmas, 1976, that his employment should not continue in the District" and that the petitioner "waives all rights that he might have had under Article 78 of the Civil Practice Law and Rules, or any other provision of law to challenge the determination of [the principal] as to his

non-retention." According to the hearing officer's summation of the stipulation at the hearing, "the stipulation today is that [the principal's] decision is absolute, final and not appealable anywhere at anytime by [petitioner] or by the School Board."

Petitioner took the leave of absence provided in the stipulation and resumed his teaching duties in September 1976. In December 1976 the school principal decided that petitioner's employment should be terminated and the Board notified him that his job was at an end in accordance with the stipulation.

In the instant proceeding, petitioner contends that he was never advised that under the stipulation "he was giving up his property rights [teacher's contract], statutory rights as a tenured teacher and was permitting his property rights and

statutory rights as a tenured teacher to be taken away without due process of law at some future date." He also claims that he did not retain the attorney who purported to represent him and that he was confused and did not fully understand the purport of the stipulation. Finally, he asserts that the 1975 charges of incompetency were vague and tenuous and that his performance for the period September to December 1976 was good as evidenced by the fact that his students achieved well, their parents had nothing but praise for his work, and no charges were brought against him concerning his conduct and performance during this period. The stipulation was, petitioner declares, an unconscionable violation of public policy and an improper alteration of his contract rights. Nevertheless, despite his current protestations, it

is apparent that when petitioner entered into the stipulation he was represented by counsel, had the advice of representatives of his bargaining agent and had full knowledge of the consequences. Absent the public policy concerns considered in this opinion, justice would mandate that petitioner be held to the bargain he knowingly made.

In an affidavit in support of the Board's answer, the District Superintendent declares that he agreed to the terms of the settlement "upon considering alternative proposals and the possible consequences of a tenure hearing." The settlement, he concluded, "would avoid the many additional hours which would have been required on the part of School District attorneys and School District personnel to fully prosecute the tenure charges brought against the petitioner."

The Superintendent thus appears to concede that the Board's objective was to avoid the burdens the tenure laws imposed upon his school district by getting the petitioner's consent to a trial period of employment after which he could be dismissed without charges or a hearing. The Board does not argue, however, that the stipulation of settlement extinguished petitioner's status as a tenured teacher and it is apparent that he retained that status until the completion of his service in December 1976 and his actual termination. Simply put, the issue is whether petitioner could validly waive in advance the tenure rights he now seeks to assert.

[1] Education Law § 3020-a, subd. 2 permits a limited waiver of the statutory hearing (i.e., the teacher may waive the hearing within ten days of receipt

of the charges). A teacher can, of course, terminate a hearing by simply resigning (*Cedar v. Commissioner of Education*, 30 A.D.2d 882, 291 N.Y.S.2d 719; see *McFerran v. Bd. of Edu., Central School Dist. # 1*, 21 A.D.2d 944, 251 N.Y.S.2d 48, affd. 15 N.Y.2d 630, 255 N.Y.S.2d 674, 203 N.E.2d 924) thus effectively forfeiting tenure rights. Here, however, petitioner did not waive the hearing upon which the original charges were based, nor did he resign. In consideration of dismissal of the pending charges he agreed to waive statutory tenure rights which he might be entitled to invoke in the future by consenting to a discharge without notice or hearing after the period of his resumption of duties from September to December 1976.

[2-4] As a general rule, a party may waive a statutory or even a constitutional provision enacted for his benefit or protection where it is exclusively a matter of private right and no consideration of public policy or morals is involved (*Selzer v. Baker*, 295 N.Y. 145, 65 N.E.2d 752; *Rosen v. New York City Teachers' Retirement Board*, 282 App. Div. 216, 122 N.Y.S.2d 485, affd. 306 N.Y. 625, 116 N.E.2d 239). However, a statutory right conferred on a private party affecting the public interest may not be waived or released if such waiver of release contravenes the statutory policy (*Estro Chemical Co. v. Falk*, 303 N.Y. 83, 100 N.E.2d 146). A party cannot in advance make a valid promise that a statute founded in public policy shall be inoperative (*Boyd H. Wood Co. v. Horgan*, 291 N.Y.422, 52 N.E.2d 932; see *Estro Chemical*

Co. v. Falk, supra; see also *Caravaggio v. Retirement Bd. of T.R.S.*, 36 N.Y.2d 348, 368 N.Y.S.2d 475, 329 N.E.2d 165). Apart from their constitutionally protected interest in the right to employment and compensation therefor of which tenured teachers cannot be deprived without due process of law (*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 [1972]), there are other significant public policy factors involved in the tenure laws. Public policy is the interest of others than the parties and that interest may not be set at naught by the acts or conduct of any party alone (*Moncel Realty Corporation v. Whitestone Farms, Inc.*, 188 Mis. 431, 68 N.Y.S.2d 673, affd. 272 App. Div. 899, 72 N.Y.S.2d 407). Tenure laws express a strong public policy "to give security to * * * members of the

educational system in the positions to which they have been appointed" (*Boyd v. Collins*, 11 N.Y.2d 228, 233, 228 N.Y.S. 2d 228, 232-233, 182 N.E.2d 610, 613). That security prevents the removal of competent teachers "for personal or political reasons to the manifest detriment of the schools" (*People ex rel. Callahan v. Board of Education*, 174 N.Y. 169, 66 N.E. 674; *Monan v. Board of Education of City of Buffalo*, 280 App. Div. 14, 111 N.Y.S.2d 797).

Reported cases concerning the waiver of tenure rights are notably sparse in this state. In *Boyd v. Collins, supra*, however, where the consideration for the teacher's waiver of a hearing on charges was a year's pay and a "good letter of recommendation," the waiver was declared invalid as a violation of the strong public policy expressed in the tenure laws.

The consequence of the instant petitioner's waiver was to render his tenure rights inoperative to the extent that he could be discharged without a hearing at the whim of a school principal at the end of a specific period of future service. A peculiarity of the instant waiver was that petitioner could not be fired without notice and a hearing during the period of his future service, but only at the end of it. At that point, however, his status abruptly became inferior to that of a probationer who would have been entitled in advice to be apprised of the reasons for his dismissal, the opportunity to submit a response in writing, and the right to have the Board of Education (and not a principal) make the determination as to whether his services should be termined (Education Law § 3031;

Board of Ed., etc. v. State Div. of Hu. Rights, 42 A.D.2d 473, 349 N.Y.S.2d 25).

[5, 6] Although there is nothing in the instant record to establish that the Board entered into the stipulation in bad faith, the procedure it adopted evaded the demands of public policy. It was a violation of petitioner's right to a hearing and due process for the principal to recommend his dismissal without notice and hearing (*Gray v. Board of Ed., Un. Fr. Sch. Dist. No. 1*, 41 A.D.2d 739, 341 N.Y.S.2d 193) and for the Board in effect to find him guilty of conduct not charged and to dismiss him (see *Soucy v. Bd. of Ed. of N. Colonie C. Sch. Dist. No. 5*, 41 A.D.2d 984, 343 N.Y.S.2d 624, app. dism., 33 N.Y.2d 653, 348 N.Y.S.2d 978, 303 N.E.2d 704; *Murray v. Murphy*, 24 N.Y.2d 150, 299 N.Y.S.2d 175, 247 N.E.2d 143). The procedure for removal

of teachers provided for in the tenure statute of the Education Law is the exclusive method for dismissal of teachers with tenure (*Kobylski v. Agone*, 37 Misc.2d 255, 234 N.Y.S.2d 907, affd. 19 A.D.2d 761, 242 N.Y.S.2d 630; see *Mannix v. Board of Education of City of N. Y.*, 21 N.Y.2d 455, 288 N.Y.S.2d 881, 235 N.E.2d 892; *Glass v. Board of Education of City of New York*, 21 A.D.2d 891, 251 N.Y.S.2d 805). Regardless of whether petitioner deserved the tenure protections the law afforded him, and no matter the motivation of either party, the statute enacted to protect tenured teachers for their own and the public's interest could not be rendered inoperative in the fashion contained in the stipulation.

[7, 8] But even apart from the waiver of future rights, the provision

in the agreement for a trial period of reemployment is of dubious validity. During that trial period, petitioner was not a probationer and he was not a temporary employee either because any effort by the Board to make a temporary appointment to a permanent position would have been deemed an attempt to evade the tenure laws (see *Serritella v. Board of Education of Westbury School District*, 58 A.D.2d 645, 396 N.Y.S.2d 57). Petitioner's status as a tenured employee whose rights terminated at the end of a particular period of service was nowhere authorized by law. A board of education has no power to make contracts with its employees which are not authorized in statute (*Downey v. Lackawanna City Sch. Dist.*, 51 A.D.2d 177, 379 N.Y.S.2d 557) and it cannot establish trial periods for

its employees except in conformity with the Education Law.

[9, 10] As a final defense the Board pleads laches, but the fact that petitioner waited until after the Board exercised its right under the stipulation does not constitute a bar to this proceeding. Laches is no defense where the relief sought is a matter of right rather than indulgence, at least as long as the statutory limitation period is complied with (see *Harman v. Board of Education*, 196 Misc. 287, 82 N.Y.S.2d 157, affd. 275 App. Div. 694, 86 N.Y.S. 2d 872, affd. 300 N.Y. 21, 88 N.E.2d 351, mot. den., 300 N.Y. 644 90 N.E.2d 497). There is no allegation here that this proceeding was not commenced within the statutory period after the invalid dismissal. Furthermore, lapse of time

without a showing of prejudice is no defense (*Glenesk v. Guidance Realty Corp.*, 35 A.D.2d 852, 321 N.Y.S.2d 685).

The petition is granted to the extent that the Board is directed to comply with the provisions of section 3020-a of the Education Law with respect to petitioner's performance of his teaching duties during the period September to December 1976. The Board shall reinstate petitioner as a teacher and pay his back salary from January 1, 1977 less any amounts earned by him from other employment during the interim.

APPENDIX D.

Here is set forth the stipulation of settlement dated October 7, 1975.

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

DIVISION OF EDUCATIONAL MANAGEMENT SERVICES

- X

STIPULATION OF SETTLEMENT :

In the Matter of :

DAVID ABRAMOVICH :

Defendant-Tenured Teacher :

- X

Administration Building
Three Village Central
School District
Micoll Road
Setauket, New York

October 7, 1975
11:55 o'clock A.M.

B e f o r e:

RICHARD C. CAHN, Esq.,

Hearing Officer

(2) A P P E A R A N C E S:

Messrs. PELLETREAU & PELLETREAU
Attorneys for Complainant
20 Church Street
Patchogue, New York 11772

By: PETER V. SNYDER, Esq.,
of Counsel
KEVIN A. SEAMAN, Esq.,
of Counsel

JAMES R. SANDNER, ESQ.
Attorney for Respondent
New York State United Teachers
260 Park Avenue South
New York, New York 10010

By: DAVID STEIN, Esq.,
of Counsel

PRESENT:

For the Three Village Central School District:

DR. PIERCE HOBAN, Superintendant of Schools

MR. BARY McMANUS, Assistant Superintendant

MR. VAL HARTO, Assistant Superintendant

For the Defendant-Tenured Teacher:

MR. DAN THREATT, Field Representative, NYSUT

MR. VICTOR VILLANDRE, President, Three Village Teachers Association

Roy A. Selenske
Reporter

(3) P R O C E E D I N G S

THE HEARING OFFICER: Let's take the appearances first.

We have Mr. Snyder and Mr. Seaman present for the Petitioner.

I think we should have a representative of the School Board too. How about Mr. Harto, since he is Complainant?

MR. SNYDER: I think we should have both of them.

THE HEARING OFFICER: I think it is Mr. Harto.

Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

We have Mr. Snyder and Mr. Seaman, the attorneys for the School Board. We have Mr. Val Harto and the Complainant, Dr. Pierce Hoban, the Superintendant of Schools.

We have Mr. Stein, the attorney for the Respondent, David Abramovich, the Respondent in person, and the two gentlemen representing the Teacher's --

MR. THREATT: Dan Threatt, Field Representative of the New York State United Teachers.

MR. VILLANDRE: Victor Villandre, President of the Three Village Teachers Association.

THE HEARING OFFICER: Let the record reflect (4) that there have been

considerable discussions between the attorneys and discussions in which I have participated with both sides, including discussions with the Respondent in the presence of his attorney and the two union representatives.

I want to express my appreciation to all of you for sitting down in a most difficult situation and attempting to work out a resolution that will be fair and satisfactory to all concerned.

And, I think that we have now done so, and I think that the result, assuming that it does become absolute, as I expect that it will, will be a far better result for all concerned than to continue this hearing with the uncertainties that always attend litigation.

First of all, the stipulation which we are about to put on the record is

conditioned upon the approval by formal resolution of the Board of Education of the Three Village Central School District.

And, since the Respondent is suspended with pay at the present time, it is agreed that his salary will continue until the date of that resolution.

Secondly, from the date of the resolution of approval by the School Board until the beginning of the fall academic term in September, 1976, the (5) Respondent, David Abramovich, will be on a leave of absence without pay.

Thirdly, commencing in September, 1976, the Respondent will be re-employed by the District as an intermediate grade teacher at the Mount School in this district, whose superintendant, and is expected to be, at the present time is John Burns.

DR. HOBAN: He is Principal.

THE HEARING OFFICER: Whose Principal -- I'm sorry -- is John Burns.

Mr. Abramovich will continue until the beginning of the Christmas vacation, 1976, as a teacher in that school.

And, no later than Christmas, 1976, John Burns, the Principal of the Mount School, acting in his sole discretion will advise the Respondent whether or not the Respondent is to continue as a teacher in his school and in the District.

It is understood and agreed that Mr. Burns' judgment in this regard will be in accordance with the professional standards which are appropriate to be applied, and also in accordance with criteria in writing, which Mr. Burns will supply to the Respondent on or before January 1st, 1976.

DR. HOBAN: 1975.

(6) MR. SNYDER: 1976.

THE HEARING OFFICER: It is understood and agreed that Mr. Burns' determination will be final.

DR. HOBAN: Off the record a minute?

THE HEARING OFFICER: Yes.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

It is further understood and agreed that the Respondent, David Abramovich, waives his right to a 3020A Hearing in the event that Mr. Burns determines at Christmas, 1976, that his employment should not continue in the District.

MR. SNYDER: Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

It is also stipulated that the Respondent waives all rights that he might

have had under Article 78 of the Civil Practice Law and Rules, or any other provision of law to challenge the determination of Mr. Burns as to his non-retention.

In other words, gentlemen, the stipulation today is that Mr. Burns' decision is absolute, final and not appealable anywhere at anytime by Mr. Abramovich or by the School Board.

(7) It is also understood and agreed that the charges which are pending today will be dismissed effective upon the approval by the School Board of the Stipulation of Settlement.

It is also understood and agreed that, if Mr. Burns, following December, 1976 --

(Discussion off the record.)

THE HEARING OFFICER: If Mr. Burns --

it is also understood and agreed that, if Mr. Burns determines that the Respondent shall be retained in employment in the District following Christmas, 1976, that the School Board thereafter, if his future conduct in their opinion merits, shall have a right to proceed against him by virtue of Section 3020A of the Education Law.

Do you understand?

MR. STEIN: Yes.

MR. THREATT: My understanding is that nothing contained in the record prior to this date would be a part of any charges they would bring.

THE HEARING OFFICER: That is correct. I am getting to that.

In other words, what we are saying and what is part of this stipulation is that the charges that (8) pre-date

today's settlement are dismissed with prejudice as soon as the School Board approves this settlement and may not be revived no matter what happens in the future.

If David Abramovich is continued in employment past December, 1975, and then at some future date the School Board decides that they ought to bring a proceeding against him based upon his conduct during his then employment, they have to bring a new proceeding under 3020A at that time.

But, that new proceeding will not contain any of the charges that we have been hearing today and yesterday and several weeks ago.

MR. SNYDER: Let me correct that, if I may. Will not be based on any evidence. The charges may be the same.

THE HEARING OFFICER: Okay. I think that is said more accurately.

In other words, it is conceivable that the School Board could conclude in the fall of 1977 that Mr. Abramovich is deficient in the same respects that his is considered deficient today.

The evidence to sustain those charges would have to be based upon his acts and conduct from (9) September, 1976 onwards.

Is that understood?

MR. SNYDER: That is my understanding.

THE HEARING OFFICER: Now, it is further understood and agreed that Mr. Burns will supply these criteria in writing to Mr. Abramovich before January 1st, 1976, but the fact that he is doing so is simply for the guidance of the

Respondent, and I want it very clear on the record that when we say that Mr. Abramovich has given up his rights to challenge Mr. Burns' determination, he is not going to be permitted to claim that Burns did not follow his own criteria.

This is merely for the guidance of the Respondent, and it does not in any way make Mr. Burns' determination less absolute.

In other words, there is no legal attack going to be possible against Mr. Burns' determination at Christmas, 1976 whatsoever.

Do you all understand that?

MR. ABRAMOVICH: I don't.

THE HEARING OFFICER: In other words, let's suppose that Mr. Burns gives you, Mr. Abramovich, certain criteria that he

says he is going to use through September to December, 1976 to judge you.
(10) He does judge you and Christmas time, 1976, he tells you that you are not acceptable to him.

You have no recourse, no appeal of any kind, even if you personally feel he did not follow his own criteria.

Do you understand that? I want to make that very clear.

(Discussion off the record.)

(Whereupon, Mr. Abramovich, Mr. Threatt and Mr. Villandre left the room to confer.)

(Discussion off the record.)

THE HEARING OFFICER: Back on the record.

It is further understood and agreed that the School District is to provide to the Respondent before January 1, 1976,

a list in writing of those areas which the School District, in which the School District feels that the Respondent is or may be deficient.

And, the purpose of this kind of a list of areas or suggestions is to give Mr. Abramovich the opportunity, if he so desires, to go to school during the Spring term of 1976 if there is some special expertise or some one or several areas where he feels he can benefit by specialized education.
(11) So that, Dr. Hoban will give him notice of that before January 1st so that he will have time to enroll in any courses that he deems appropriate.

The stipulation goes further, however, in that the School District will make the reading teacher and the other specialist teachers available during the

spring of 1976 for Mr. Abramovich for consultation and he is also to be permitted from time to time to observe at the Mount School so that he will be in a position to familiarize himself with procedures and educate himself as to what will be expected of him when he starts teaching in the fall of 1976.

MR. SNYDER: Can I interrupt a minute for a second?

THE HEARING OFFICER: Yes.

MR. SNYDER: Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

Any requests for consultation or observation will be made by Mr. Abramovich to Mr. Burns, the Principal of the Mount School, or through Mr. Burns, if it involves personnel who are not specifically assigned to that school.

And, the School District agrees that they will (12) cooperate with any requests that come --

DR. HOBAN: Any reasonable request.

THE HEARING OFFICER: -- any reasonable requests that come from Mr. Burns in this regard.

Now, I don't know if I stated it for the record, but it is clearly understood and agreed that, when this stipulation becomes absolute because of its approval by resolution of the School Board, at that moment the Respondent's salary will cease and it will not resume again until he commences his teaching duties in September of 1976.

MR. STEIN: I have a question at this time, a clarification.

We want to know at which step Mr. Abramovich is going to be compensated.

DR. HOBAN: His present step. David, we are thinking on the same line.

The present step he is on. He is on a leave of absence and does not advance.

MR. SNYDER: Following the contract.

THE HEARING OFFICER: Is it understood that the salary in September of 1976 will be at the same step that it is presently at.

MR. THREATT: In the event he takes course work (13) and this should cause him to move horizontally --

DR. HOBAN: We will apply the same criteria.

MR. HARTO: He would move laterally. He does not move vertically.

THE HEARING OFFICER: I think we all understand.

Have I left out anything?

MR. SNYDER: I have --

THE HEARING OFFICER: No?

MR. ABRAMOVICH: Yes, the file.

THE HEARING OFFICER: We are going to make that a separate thing.

MR. SNYDER: Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

Is there anything that anyone can think of that I have not stated for the record?

(Silence.)

MR. ABRAMOVICH: Could we have it reread?

THE HEARING OFFICER: Mr. Reporter, would you reread the stipulation?

(Whereupon, the entire proceedings were reread.)

(Discussion off the record.)

DR. HOBAN: You cannot, the Union

cannot grieve a transfer of a Mount teacher whose place David took, (14) as long as we transfer in accordance with the contract.

THE HEARING OFFICER: Is that understood?

MR. VILLANDRE: As long as the provisions of the contract are adhered to, that is our understanding.

MR. SNYDER: Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

Let the record show, if a transfer of a teacher out of the Mount School to make room for the Respondent itself sets off a chain of other transfers, that those transfers will also not be the subject of a grievance.

DR. HOBAN: We will get you a grade placement as quickly as we can, and I

will try as quickly as we can.

MR. ABRAMOVICH: I think that is a paramount issue in terms of my preparation.

THE HEARING OFFICER: Let the record also show that the School District, as early as possible, will let the Respondent know what grade level he will be assigned to, so he can begin to make preparation to make up lesson plans and so forth.

All right.

I think that we have concluded the stipulation (15) except for one thing, and that is the following:

Mr. Snyder raised this point off the record before, and I think it should be placed on the record.

If, for any reason at any time -- and, I can't imagine that this would

happen and I don't think any of us can -- some court should set aside the stipulation as improper or on the grounds that the teacher could not, for some reason, agree to what he has agreed to or the School Board could not agree to what they agreed to or any other reason, that the setting aside of this stipulation, of course, would place all of the parties back in status quo as of today, which would mean that these present charges at that point would have to be tried.

That would be an unfortunate thing if it happened, but I think we ought to cover it by stipulation.

All right.

Now, Mr. Abramovich, I am going to ask you if you have any objection to being sworn. Thereafter, I will ask you questions relative to this settlement.

MR. ABRAMOVICH: No, I would just like the date the class assignment -- I would like to set a date --

(16) DR. HOBAN: I can't give it to you.

THE HEARING OFFICER: The District cannot make a commitment as to a date, because of this April 1st voluntary transfer deadline. They will not know until then.

DR. HOBAN: We will try as hard as possible to give you that as soon as we can. We understand it is a question of preparation and everything else.

THE HEARING OFFICER: All right.

(Whereupon, there was a brief recess for the benefit of Mr. Abramovich.)

THE HEARING OFFICER: On the record.

Mr. Abramovich, would you please stand and raise your right hand.

D A V I D A B R A M O V I C H, having been first duly sworn, testified as follows:

THE HEARING OFFICER: Would you please state your full name and address for the record?

THE WITNESS: David Leonard Abramovich, 7 Central Avenue, Miller Place, New York.

THE HEARING OFFICER: Mr. Abramovich, are you the Respondent in this proceeding?

THE WITNESS: Yes.

THE HEARING OFFICER: And, have you been present (17) this morning while we dictated the Stipulation of Settlement on the record?

THE WITNESS: Yes.

THE HEARING OFFICER: And, have you been present with your attorney, David

Stein?

THE WITNESS: Yes.

THE HEARING OFFICER: And, have you also conferred with the two representatives of the Teacher's Union and the New York State United Teachers?

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

And, have you had an opportunity to discuss the proposed settlement with your attorney and with your union representatives privately, without anyone else present?

THE WITNESS: Yes.

THE HEARING OFFICER: And, have you so discussed it with them and each of them?

THE WITNESS: Yes.

THE HEARING OFFICER: And, have you

been fully advised of your legal rights, to the best of your knowledge and understanding?

THE WITNESS: Yes.

THE HEARING OFFICER: And, your rights under the (18) union contract?

THE WITNESS: Yes.

THE HEARING OFFICER: And, have you heard all of the provisions of the stipulation which, for the most part, I dictated into the record?

THE WITNESS: Yes.

THE HEARING OFFICER: And, were you present when the Court Reporter read the stipulation out loud to us all?

THE WITNESS: Yes.

THE HEARING OFFICER: And, you heard him do that?

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

Did you understand the stipulation?

THE WITNESS: Yes.

THE HEARING OFFICER: And, you understand each and every part of it?

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

Do you understand, Mr. Abramovich, that you have a right not to settle this case, that you have a right to continue with this hearing?

THE WITNESS: Yes.

THE HEARING OFFICER: And defend yourself on the (19) pending charges?

THE WITNESS: Yes.

THE HEARING OFFICER: You have a right, in other words, to put the School Board to the proof and prove the charges against you.

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

And, that your rights are guaranteed under Section 3020A of the Education Law?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: All right.

And, in entering into the settlement, you understand that you are giving up your right to have a continuance of this hearing?

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

Do you agree to each of the terms of the Stipulation of Settlement?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: You consent to it?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: And, you consent to each and every part of the stipulation, Stipulation of Settlement?

(20) THE WITNESS: Yes, I do.

THE HEARING OFFICER: And, you feel that you understand fully each and every part of the stipulation?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: Do your further understand that, in agreeing to the settlement today, that you are giving up your right to compensation from the date that the School Board approves the settlement until the beginning of the fall term, 1976?

THE WITNESS: Yes.

THE HEARING OFFICER: And, that you will be on leave of absence without pay during that entire period of time?

THE WITNESS: I understand.

THE HEARING OFFICER: All right.

And, do you understand further that, when you resume your employment in September of 1976 and continue through to the Christmas vacation in December of 1976, that at that point you are entirely in the hands of Mr. John Burns, the Principal of the Mount School?

Off the record.

(Discussion off the record.)

THE HEARING OFFICER: On the record.

What I mean by that is, whether or not you are (21) retained in employment past Christmas, 1976, is in the sole discretion of Mr. Burns.

THE WITNESS: I understand that.

THE HEARING OFFICER: All right.

And that, if he decides for whatever

reasons, valid or otherwise in your opinion, that you are not to be retained, that you have no further right of appeal against that decision? Do you understand that?

THE WITNESS: Yes.

THE HEARING OFFICER: In other words, you are giving up your right then to challenge the determination under 3020A of the Education Law.

Do you understand that?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: And, you are also giving up your right to bring an Article 78 proceeding in the courts to challenge the determination that you won't continue in employment?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: And, you are giving up all of your rights to challenge that determination on whatever basis, even if you feel that Mr. Burns is not following his own criteria that he gave you on January 1st, you still don't have a right to challenge (22) his determination.

Do you understand that?

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

That is agreeable to you? You accept that?

THE WITNESS: Yes.

THE HEARING OFFICER: All right.

Now, you understand that the settlement, which has been reached today, is conditioned upon the School Board approving it by a formal resolution?

THE WITNESS: Yes, I do.

THE HEARING OFFICER: And, although everyone in this room has agreed to the settlement, we still cannot assume that it takes legal effect until the School Board acts?

THE WITNESS: I understand.

THE HEARING OFFICER: Now, if the School Board should turn down the settlement for some reason, we will have to come back here and resume the hearing?

THE WITNESS: Yes.

THE HEARING OFFICER: You understand that too?

THE WITNESS: Yes.

THE HEARING OFFICER: Have you had counsel throughout this hearing?

(23) THE WITNESS: Yes, I have.

THE HEARING OFFICER: And prior to the hearing?

THE WITNESS: Yes, I have.

THE HEARING OFFICER: And, have you discussed the charges with your attorney?

THE WITNESS: Yes, I have.

THE HEARING OFFICER: Throughout every stage of the proceeding?

THE WITNESS: Yes, I have.

THE HEARING OFFICER: And, were you present at the time that we took the testimony all day yesterday?

THE WITNESS: Yes, I was

THE HEARING OFFICER: All right.

(Witness excused.)

THE HEARING OFFICER: Now, Mr. Harto, you are the Complainant?

MR. HARTO: Yes.

THE HEARING OFFICER: Let me swear you in too.

V A L H A R T O, having been first duly sworn, testified as follows:

THE HEARING OFFICER: State your full name and address.

THE WITNESS: Val Harto, 6 Hiawatha Lane, Setauket, New York.

(24) THE HEARING OFFICER: You are the Complainant in this proceeding against David Abramovich?

THE WITNESS: Yes, I am.

THE HEARING OFFICER: And, have you been present at the time that the disposition of these charges has been discussed? The settlement of these charges?

THE WITNESS: Yes.

THE HEARING OFFICER: Were you present when we dictated the Stipulation of Settlement into the record?

THE WITNESS: Yes, I was.

THE HEARING OFFICER: And, when it

was read back, you heard that?

THE WITNESS: Yes, I was.

THE HEARING OFFICER: And, subject to the approval of the School Board, are you agreeable to a dismissal with prejudice of these charges on the basis of the terms and conditions of this stipulation?

THE WITNESS: Yes, I am.

THE HEARING OFFICER: All right.

(Witness excused.)

THE HEARING OFFICER: Mr. Snyder, as the attorney for the Petitioner, do you consent to the disposition (25) that we have made today of this proceeding?

MR. SNYDER: I do.

THE HEARING OFFICER: And, Mr. Stein, as the attorney for the Respondent, do you consent?

MR. STEIN: Yes.

THE HEARING OFFICER: I take it there is no objection from either of the union representatives who are present? Mr. Threatt?

MR. THREATT: No.

THE HEARING OFFICER: Do you understand the stipulation, agree to it?

MR. THREATT: Yes, I do.

THE HEARING OFFICER: I don't think it is necessary to swear you in.

Mr. Villandre, as the President of the Local Teacher's Association, do you understand and consent to all of the conditions and terms of the stipulation of settlement?

MR. VILLANDRE: Yes, I do.

THE HEARING OFFICER: That will conclude the stipulation and proceedings attendant upon that.

Now, -- off the record.

(Discussion off the record.)

(Whereupon, at 1:30 o'clock P.M., the proceed- (26) ings for this Stipulation of Settlement were concluded.)

(Whereupon, the following proceedings took place before the three Panel Members assigned to hear the matter of David Abramovich, Defendant-Tenured Teacher.)

THE HEARING OFFICER: Gentlemen of the Panel.

We have had a long session in Dr. Hoban's office with Mr. Abramovich and his lawyer and the union representatives and the school administrators and Mr. Snyder.

And, we have dictated a long Stipulation of Settlement on the record.

It is conditioned upon approval by the School Board, and the School Board

meets tonight. And, Mr. Snyder and Dr. Hoban are both reasonably certain that the stipulation will be approved as early as tonight by the School Board.

When approved, I can advise you that the Panel can be disbanded and the charges will be dismissed because of the terms of the stipulation.

If for any reason the School Board does not approve the stipulation, then we will have to come back and recommence our hearing.

(27) DR. GOLDMAN: What is the date we might --

THE HEARING OFFICER: I am fixing a date of Monday, October 27th at ten o'clock here as a conditional return date, with every expectation in my mind that we will not have to come back at all. Just so we have a date picked in case.

Okay.

Now, because there is always the possibility that we will have to come back and re-try the case, I do not want to tell you what the terms of the stipulation are.

But, let me just say to you that I think everyone seems to think it is fair to all sides, all people concerned, and if the stipulation does become final and you are curious to know what it is, when you talk to my office, perhaps later in the week, I would be glad to tell you the terms at that time.

I will express my appreciation to all three of you for taking the time to come.

I think, as interesting as it is to sit in these cases, it is always better if they can be resolved by agreement

between the parties, because there is a lot of evidence that would have to be heard and a lot of soul-searching on everyone's part, and a lot of work (28) for all of us, which now, which would probably not leave anybody entirely happy.

And now, we have a situation where, I think, both sides are pretty reasonably satisfied.

So, I think we did a service to be here and be available and create a framework in which settlement negotiations, meaningful ones, could take place.

So, thank you very much, and I am sure the Commissioner of Education would want to express his thanks to all of you.

(Whereupon, at 1:23 o'clock P.M. the proceedings were concluded.)

* * * *

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

I, ROY A. SELENSKE, a Shorthand (Stenotype) Reporter and Notary Public of the State of New York, do hereby certify that the foregoing Proceedings, taken at the time and place aforesaid, is a true and correct transcription of my shorthand notes.

I further certify that I am neither counsel for nor related to any party to said action, nor in any wise interested in the result or outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my name this 17 day of October, 1975.

ROY A. SELENSKE

APPENDIX E.

Here is set forth old and new sections of Section 3020-a of the New York State Education Law.

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the

alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee

shall notify the clerk of the employing board whether he desires a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within five days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school

district, or county seat, within fifteen days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual

service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within five days of receipt of such hearing report the employing board shall determine the case by vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

Added L.1970, c.717 §16, eff. July 1, 1970.

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-

five hundred ninety-j of this law, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be

suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk or secretary of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk or secretary of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and

fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, chief school adminis-

trators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members except the chairman of the panel shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member. The chairman of the panel shall be paid the normal and customary fee paid to him for services as an arbiter under the auspices of the American Arbitration Association.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All

such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose and from a list supplied by the American Arbitration Association: one member shall be selected by the employee, and one member shall be selected by the employing board from the list maintained by the commissioner, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education, from the list supplied by the American Arbitration Association. Such third member shall be chairman of the panel.

Each such hearing shall be conducted by the chairman of the panel and shall be public or private at the discretion of the employee. The employee shall have

a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee and the board of education involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and

recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Either the employee or the employing board may review the findings of the hearing panel either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under

article seventy-eight of the civil practice law and rules. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

6. Notwithstanding any other provision of law to the contrary, a hearing panel member who is employed by a public school district or board of cooperative educational services shall be released from duty by such district or board for such period necessary to carry out the responsibilities of such panel member. Nothing contained in this subdivision shall be construed to diminish or impair any benefits to which such hearing panel member or his legal representative or beneficiaries would be otherwise entitled had such panel member not been released from duty in accordance with the provisions of this subdivision, provided, however, that such

district or board may require such panel member to reimburse such district or board an amount equal to the daily compensation otherwise payable pursuant to this section.

As amended L.1971, c. 703, §§ 1-3; L.1973, c. 772, § 1; L.1977, c. 82, § 4; L.1978, c. 591, § 1; L.1978, c. 594, § 1.

1978 Amendments. Subd. 3, par. c. L.1978, c. 591, § 1, eff. July 24, 1978, in sentence beginning "A copy of" inserted "and the board of education".

Subd. 6, L.1978, c. 594, § 1, eff. July 24, 1978, added subd. 6.

1977 Amendment. Subd. 1. L.1977, c. 82, § 4, eff. Apr. 15, 1977.

APPENDIX F.

Here is set forth old and new sections of Section 3013 of the New York State Education Law, which was repealed on June 19, 1978, and is presently covered by Section 3012 of the New York State Education Law.

§ 3013. Tenure: certain other school districts

1. Teachers, principals, except principals of the district, supervisors and all other members of the teaching and supervising staff, of school districts employing eight or more teachers, other than city school districts and school districts having a population of four thousand five hundred or more and employing a superintendent of schools, shall be appointed by a majority vote of the board of education or trustees upon recommendation of the district superintendent of schools from lists submitted to such district superintendent by the principal of the district in which they are to be employed for a probationary period of not to exceed five years. Any principal of the district, however, shall be appointed by such school authorities upon the recommendation of

the district superintendent of schools. Services of a person so appointed to any such positions may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees.

2. On or before the expiration of the probationary term of a person appointed for such term, except the principal of the district, the district superintendent of schools shall make a written report to the board of education or trustees recommending for appointment on tenure, from lists and reports furnished by the principal of the district, those persons who have been found competent, efficient and satisfactory. Any principal of the district, however, shall be recommended for appointment on tenure to such school

authorities by the district superintendent of schools. By a majority vote the board of education, or trustees may then appoint on tenure any or all of the persons recommended by the district superintendent of schools. Such persons shall hold their respective positions during good behavior and competent and efficient service and shall not be removed except for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) Insubordination, immoral character or conduct unbecoming a teacher; (b) Inefficiency, incompetency, physical or mental disability or neglect of duty. Each person who is not to be so recommended for appointment on tenure shall be so notified in writing by the district superintendent not later than sixty days immediately preceding the expiration of his probationary period.

3. Nothwithstanding any other provision of this section no period in any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

L.1947, c. 820; amended L.1952, c. 407, § 2; L.1955, c. 859, § 5; L.1959, C. 868 § 5; L.1962, C. 310, § 117; L.1970, C. 717, §§ 11-13, eff. July 1, 1970.

Historical Note.

Subd. 2 amended L.1952, c. 407, § 2, eff. July 1, 1952; L.1970, c. 717, § 11, eff. July 1, 1979. L.1970 provided for a hearing under section 3020-a.

Former subd. 2-a, which related to time limitations in bringing charges, added

L.1959, c. 868, § 5, was repealed L. 1970, c. 717, § 12, eff. July 1, 1970.

Subd. 3, formerly 5, added L.1955, c. 859, § 5, renumbered 3, L.1970, c. 717, § 13, eff. July 1, 1970. Former subd. 3, which related to removal procedure, was repealed L.1970, c. 717, § 12, eff. July 1, 1970.

Former subd. 4, which related to appeal from determination of board, was amended L.1962, c. 310, § 117, and repealed L.1970, ci 717, § 12, eff. July 1, 1970.

Derivation. Education Law of 1910, § 312-b, added L.1945, c. 833.

Note of Commission on 1947 Revision.--Section revised; former § 312-b; heading amended to conform to body of section; "section" substituted for "act"; article reference renumbered; reference to "certi-orari" corrected; minor corrections in punctuation and phraseology; references to "board of trustees" added to conform to context.

§ 3012. Tenure: certain school districts

1. (a) Teachers and all other members of the teaching staff of school districts employing eight or more teachers, other than city school districts, shall be appointed by the board of education, upon the recommendation of the superintendent of schools, for a probationary period of three years; provided, however, that in the case of a teacher who has been appointed on tenure in another school district within the state, the school district where currently employed, or a board of cooperative educational services, and who was not dismissed from such district or board as a result of charges brought pursuant to subdivision one of section three thousand twenty-a of this chapter, the probationary period shall not exceed two years. The service of a person appointed to any of such

positions may be discontinued at any time during such probationary period, on the recommendation of the superintendent of schools, by a majority vote of the board of education.

(b) Principals, administrators, supervisors and all other members of the supervising staff of school districts employing eight or more teachers, other than city school districts, shall be appointed by the board of education, upon the recommendation of the superintendent of schools for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools, by a majority vote of the board of education.

(c) Any person previously appointed to tenure or a probationary period pursuant

to the provisions of former section three thousand thirteen of this chapter hereafter to be repealed, shall continue to hold such position and be governed by the provisions of this section notwithstanding any contrary provision of law.

2. At the expiration of the probationary term of a person appointed for such term, subject to the conditions of this section, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. Such persons, and all others employed in the teaching service of the schools of such union free school district, who have served the probationary period as provided in this section, shall hold their respective positions during good behavior and efficient

and competent service, and shall not be removed excpet for any of the following causes, after a hearing, as provided by section three thousand twenty-a of such law: (a) insubordination, immoral character of conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; (c) failure to maintain certification as required by this chapter and by the regulations of the commissioner of education. Each person who is not to be recommended for appointment on tenure, shall be so notified by the superintendent of schools in writing not later than sixty days immediately preceding the expiration of his probationary period.

3. Notwithstanding any other provision of this section no period in any school year for which there is no required service

and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights of any of the persons hereinabove described.

L.1947, c. 820; amended L.1952, c. 407, § 1; L.1955, c. 859, § 4; L.1959, c. 868, § 4; L.1960, c. 326, §§ 1-3; L.1962, c. 310, § 116; L.1970, c. 717, §§ 8-10, eff. July 1, 1970.

Supreme Court, U. S.
FILED
JUL 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1947

DAVID ABRAMOVICH,

Petitioner,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, SUFFOLK COUNTY, NEW YORK, a/k/a THREE VILLAGE CENTRAL SCHOOL DISTRICT No. 1,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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PELLETREAU & PELLETREAU
PETER V. SNYDER
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 78-1947.

DAVID ABRAMOVICH,

Petitioner,

v.

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF BROOKHAVEN AND SMITHTOWN, SUFFOLK COUNTY, NEW YORK, a/k/a Three Village Central School District No. 1,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Counterstatement of Questions Presented Pursuant to Rule 40.

Is a stipulation between a teacher and a school district freely entered into during a disciplinary hearing by the terms of which (a) that hearing is terminated and (b) the teacher agrees to serve a four month trial period during which his competence will be evaluated by his new principal, binding upon both the teacher and the school district?

Counterstatement of Facts Pursuant to Rule 40.

David Abramovich was employed by the Three Village Central School District to teach in the elementary grades and was tenured as an elementary teacher.

In May, 1975, pursuant to the appropriate sections of the Education Law, the Assistant Superintendent for Personnel preferred forty-nine specific charges of insubordination, incompetency, neglect of duty, and conduct unbecoming a teacher against Mr. Abramovich. The Board of Education found probable cause as to each and every charge, and the teacher demanded a hearing. In due course, a hearing panel of three members was selected; and a hearing officer was appointed by the Commissioner of Education. The hearings commenced on September 4, 1975, and continued on October 6 and October 7 during the course of which the School District commenced its presentation of evidence (both written and oral) through the testimony of its witnesses. The teacher was represented by Counsel for the New York State United Teachers and advised by a "N.Y.S.U.T." field representative and the Teachers' Association President.

Discussions took place concerning a possible settlement among the hearing officer, the attorneys for the School District, the attorney for the teacher and the two union representatives on the third day of the hearings and resulted in a stipulation of settlement entered upon the record and agreed to by all parties including not only the principal's representatives, but by the principals themselves (Appendix in Petition pp. 89-130).

The stipulation provided (1) that the teacher would take an unpaid leave of absence until September, 1976; (2) that he would be re-employed at that time and serve under a new school principal until December of 1976; (3) that this school principal would supply the teacher with written criteria setting forth his expected standards of conduct before January 1, 1976 (nine months before he reported for duty); (4) that the School District would supply the teacher on or before that date with a written list of the areas in which the District believed him to be

deficient; (5) that the School District would provide the teacher with special instruction in the teaching of reading and other specialties; (6) that the School District would permit the teacher to audit classes during that current school year; (7) that the School District would withdraw the charges with prejudice; (8) that the school Principal would evaluate the teacher during the period from September to December, 1976, based on the criteria supplied by him to the teacher; and, (9) that his evaluation would be binding on both parties and would determine whether the teacher was to be continued or terminated. The stipulation clearly stated that no appeal could be made by either party, and if the stipulation were held to be illegal, the charges were to be reinstated and the hearing continued. The teacher, under oath, swore that he understood all of these agreements (Petition pp. 114-122).

The School District provided the list of deficiencies (Appendix A); the School District supplied the criteria (Appendix B); the School District made its specialists available for the teacher's instruction; the teacher reported for duty in September, 1976, and his principal found him unfit in December, 1976.

The teacher then brought a proceeding in the Supreme Court, Suffolk County, New York under CPLR Article 78 alleging that he never retained the attorneys who represented him during the three days of hearings; that although his attorney recommended he agree to the stipulation, he never really understood it; and he was illegally terminated on the advice of the school principal because his dismissal was not the result of a further hearing on new charges.

The trial court held that the teacher was properly represented and understood the stipulation, but that the stipulation was totally void as against public policy. The Court ordered the teacher reinstated but held that no

further hearing on the old charges could be had even though the parties had agreed to reinstate the charges in the event the stipulation was held to be illegal.

The School District appealed and the Appellate Division, Second Department, unanimously reversed Special Term, holding that the stipulation made, as it was, in open "court" with both sides fully represented, was not against public policy.

Upon appeal, the New York Court of Appeals unanimously affirmed.

ARGUMENT.

I.

A party may waive constitutional rights to a due process hearing.

This court has held that a civil litigant may waive his due process rights to a notice and a hearing prior to judgment.

> *D. H. Overmyer Co., Inc. of Ohio v. Frick Company,* 405 U.S. 174, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972).

The same is true of a criminal defendant.

> *Illinois v. Allen,* 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

To be valid, the waiver must be made under circumstances which assure the court that there was no overreaching on the part of the other party and that the one waiving knew or should have known the importance of his waiver.

> *National Equipment Rental Ltd. v. Szukhent,* 375 U.S. 311, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964); *United States v. Fong,* 529 F. 2d 55 (CCA 9th, 1975).

The state need not prove that the person waiving knew that he had the right to refuse to waive.

> *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

In the case at bar, the teacher demanded a hearing by a panel of three experts who were charged with the responsibility of determining the validity of the many changes levied against him. They were to recommend the penalty, if any, to the Board of Education, which, under the law as it then stood, was to make a final determination, which in turn, was appealable to the state courts.

> *Education Law,* §3020(a).

It was during these hearings, after evidence had been given both in oral and written form, that the parties and their counsel agreed to a withdrawal of the charges; a reassignment of the teacher to a new school; a reappraisal of his conduct there by the principal. The school was to, and did, supply him with a list of his deficiencies and methods of improvement.

Petitioner entered into this agreement voluntarily and knowingly.

> "The Hearing Officer: All right. Did you understand the stipulation?
> The Witness: Yes.
> The Hearing Officer: And, you understand, Mr. Abramovich, that you have a right not to settle this case, that you have a right to continue this hearing?
> The Witness: Yes.

. . .

The Hearing Officer: And you feel you understand fully each and every part of the stipulation?
The Witness: Yes, I do.

. . .

The Hearing Officer: All right. And, do you understand further that, when you resume your employment in September of 1976 and continue through to the Christmas vacation in December of 1976, that at that point you are entirely in the hands of Mr. John Burns, the Principal of the Mount School?
Off the Record.

(Discussion off the Record.)
The Hearing Officer: On the record; what I mean by that is, whether or not you are retained in employment past Christmas, 1976, is in the sole discretion of Mr. Burns.
The Witness: I understand that.
The Hearing Officer: All right. And that if he decides for whatever reasons . . . that you are not to be retained, you have no further right of appeal.
The Witness: Yes."

The record shows that his counsel and union representatives were present and agreed to the arrangement.

Having once agreed by this form of decision, the petitioner should not now be free to withdraw.

Keys v. Sawyer, 353 Fed. Supp. 936 (DCSD tex, 1973).

This is not a case which petitioner received nothing for his agreement. Here, the school district withdrew the charges in the midst of the trial.

McDonough v. Hardware Dealers Mutual Fire Insurance Co., 448 F. 2d 870 (CCA 1st, 1971);
United States v. Gomez, 457 F. 2d 593 (CCA 4th, 1972);
Zerschausky v. Beto, 396 F. 2d 356 (CCA 5th, 1968) Cert. Den. 393 U.S. 1004, 89 S. Ct. 493, 21 L. Ed. 2d 468.

Perhaps the petitioner, when he chose to be judged by Mr. Burns rather than the panel assembled, thought he would be better off. He may have been mistaken, but his choice was not unconstitutional.

Davis v. Dunbar, 394 F. 2d 754 (CCA 9th, 1968) Cert. Den. 393 U.S. 884, 89 S. Ct. 192, 21 L. Ed. 2d 159.

Nor is petitioner's claim that he was under duress because, under State law, the Board of Education played both an investigative and administrative role supported either by the evidence or by law.

Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1974).

"The initial charge or determination of probable cause and ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation." P. 58 (p. 1470).

Conclusion.

The petition should be denied because:

(a) there is no evidence of overreaching;

(b) there is ample evidence that the petitionr knew what he was doing when he agreed to the stipulation of settlement;

(c) his agreement was based on substantial consideration;

(d) thus, the waiver of further hearings was constitutionally acceptable.

Respectfully submitted,

PELLETREAU & PELLETREAU,
Attorneys for Respondent,
Box 110—20 Church Street,
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(516) 475-5656.

PETER V. SNYDER, Esq.,
Of Counsel.
KEVIN A. SEAMAN, Esq.,
Of Counsel.

APPENDIX A.

November 6, 1975

To: Dr. P. Hoban
From: Warren Hochberg
Re: David Abramovich

Mr. Abramovich evidenced the following deficiencies during the 1973-74 and 1974-75 school years. He was unable to:

1. diagnose in the reading area
2. prescribe in the reading area
3. evaluate in the reading area
4. teach reading
5. conduct reading groups
6. diagnose in the language area
7. prescribe in the language area
8. evaluate in the language area
9. diagnose in the arithmetic area
10. prescribe in the arithmetic area
11. evaluate in the arithmetic area
12. conduct an adequate science program
13. conduct an adequate social studies program
14. understand how to teach skills
15. motivate pupils to academic interests
16. follow curriculum guides
17. use a basal text
18. keep student records
19. report observable pupil behavior

20. plan on a yearly basis
21. plan on a short term basis
22. plan on a daily basis
23. provide plans for his substitutes
24. help his pupils plan
25. help his pupils evaluate
26. follow school rules
27. keep appointments
28. follow suggestions for improvement
29. demonstrate regard for school processes
30. set acceptable standards of work
31. set reasonable expectations for behavior
32. develop an atmosphere conducive to learning
33. use audio-visuals effectively
34. develop performance objectives
35. supervise pupils
36. respond to administrative requests
37. respond to administrative directives
38. keep accurate attendance records
39. maintain a safe environment
40. follow contract stipulations
41. fill out report cards properly
42. develop a classroom management system
43. control classroom distractions
44. control pupil movement in class
45. control pupil movement in halls
46. control pupil movement on playground

47. help pupils to observe school rules
48. demonstrate regard for school property
49. care for school materials
50. arrive in time for many staff meetings
51. arrive in time for work on many days
52. maintain a clean environment.

WH/jh

APPENDIX B.

WILLIAM SIDNEY MOUNT SCHOOL

STONY BROOK, NEW YORK

11790

THE THREE VILLAGE CENTRAL SCHOOL DISTRICT

December 17, 1975

Mr. David Abramovich
7 Central Avenue
Miller Place, New York 11764

Dear Mr. Abramovich:

This letter is in response to Dr. Hoban's request to establish your goals and grade placement. You have been assigned a fourth grade position with the following expectations:

I. *Teacher's administrative responsibilities:*

a) To follow all time schedules.

b) To keep accurate attendance, testing and pupil progress to parents.

c) To follow an approved procedure for reporting pupil progress to parents.

d) To read, understand and comply with all items in the "Mount Manual".

(See attached marked A—An updated "Mount Manual" will be provided in August.)

e) To read, understand and comply with all notices from the "Office of Principal".

f) To provide the Principal's Office with all written responses that are requested.

II. *Supervision responsibilities:*

a) To provide the proper supervision of your class at all times scheduled.

b) To take responsibility for supervision of any on the spot situation that arises in the school with all Mount students.

c) To establish a successful discipline program for your class.

d) To properly carry out all supervision duties assigned.

Note—Supervision and discipline responsibilities are covered in detail in the "Mount Manual". See attached marked A.

III. *Curriculum:*

a) You should use the following sources:

1. New York State Curriculum Guides
2. Three Village Curriculum Guide
3. Approved textbook series

b) Any change, addition or omission must be approved by the building principal.

c) You are expected to have knowledge of all subject areas. To be able to provide curriculum instruction that is appropriate to the individual needs of the student.

IV. *Instructional philosophy and skill:*

a) To be able to incorporate all the suggestions enumerated in "My Philosophy and Thoughts about Education". See attached marked B.

b) To be able to provide basic skills, enrichment and remedial help to all students in a variety of ways, so that you can match the student's learning style or strength with an appropriate approach.

c) To be thoroughly familiar with all aspects of the "Phases of Learning". See attached marked C.

V. *Classroom Organization, Planning and Instructional Techniques:*

All suggestions and activities outlined in attached notices B, D, & E should be researched and incorporated into your program.

VI. *"September" Goals:*

Each September the staff is asked to establish goals with the principal. In your situation, I am establishing the above goals (Paragraphs I through V) and the following goal:

To successfully carry out all the responsibilities of a teacher and to correct all deficiencies listed on the letter from Mr. Hochberg dated November 6, 1975.

In conclusion, I would like to comment on evaluation since, my evaluation of you is of utmost importance. I am extremely proud of my staff at Mount School and I consider you as a potential permanent member. To *earn* this position, I must be assured that you have succeeded

in your job to a degree of competence commensurate with a *Mount* teacher.

I wish you the best in your preparation and assignment to Mount School.

Sincerely,

JOHN A. BURNS
Principal

JAB:jf
cc: Dr. Hoban and Mr. Harto

encls.

a) The Mount Manual marked A.

b) My Philosophy and Thoughts about Education marked B.

c) Phases of Learning marked C.

d) Personal goals for consideration marked D.

e) Items for consideration when using the "End-of-Year Evaluation Form" marked E.

f) Memorandum to Dr. Hoban from Mr. Hoehberg dated November 6, 1975 marked F.